79-238

IN THE SUPREME COURT OF THE UNITED STATES

DOROTHY AYLESWORTH
Respondent,

-vs- No.

MUTUAL OF OMAHA INSURANCE COMPANY,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Arthur M. Hoffeins (P-15030)
Attorney for Petitioner
3553 City National Bank Building
Detroit, Michigan 48226
Telephone: (313) 962-6630

AMERICAN PRINTING COMPANY
125 WEALTHY STREET, S.E., GRAND RAPIDS, MICHIGAN 49503 — (616) 458-5326
1200 WEST FORT STREET, DETROIT, MICHIGAN 48226 — (313) 963-9310

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Mutual of Omaha Insurance Company, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on May 22, 1979, rehearing being denied on June 11, 1979.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit appears as Appendix A. The Order denying Petition for Rehearing appears as Appendix B. The transcript of the opinion of the United States District Court for the Eastern District of Michigan, Southern Division, appears as Appendix C.

JURISDICTION

The judgment of the Court of Appeals was entered on May 22, 1979. A timely Petition for Rehearing was denied on June 11, 1979, and this Petition for a Writ of Certiorari is filed within 90 days of that date. Jurisdiction is conferred upon this Court by Title 28, United States Code Section 1254(1).

QUESTION PRESENTED

Did the Court of Appeals, obliged to decide the case in accordance with state law, give Petitioner a proper judicial hearing as required by law when it failed to consider a state supreme court decision defining a contract term the meaning of which the Court of Appeals deemed pivotal, when it assumed the existence of facts beyond what was established by the record in the District Court, and when in arriving at its decision it considered the reputation of the District Judge whose decision was the subject of its review?

STATEMENT OF THE CASE

Robert W. Aylesworth, the deceased insured, was covered for $200,000.00 by a travel accident policy, issued by Petitioner, the pertinent provisions of which are as follows:

PART A

" 'Injuries' " means accidental bodily injuries received while this policy is in force and resulting in loss independently of sickness and other causes and received:

. . . .

"2. AIRPORT PREMISES: AIRPORT BUS AND LIMOUSINE SERVICE—while on any airport premises immediately before boarding or immediately after alighting from an aircraft on which the Insured is covered by this policy; or injuries received while riding as a passenger in an airport bus or limousine provided or arranged for by an airline or the airport authority, but only (a) when going to, or after being at, an airport for the purpose of boarding an aircraft on which the Insured is covered by this policy or (b) when leaving an airport after alighting from such an aircraft.

"3. COMMON CARRIER—while riding as a passenger in, boarding or alighting from any public land, air or water conveyance provided by a common carrier primarily for passenger service."

The widow of the deceased insured brought an action in the United States District Court against Petitioner, Mutual of Omaha Insurance Company. Concessions of fact were made in connection with both parties' motions for summary judgment. It was agreed that the insured was covered by the policy referred to above and that on March 4, 1976, after apparently paying his fare to get into a subway station in Toronto, Ontario, Canada, the insured, who was standing on a subway platform, apparently fell onto the tracks and was killed by a subway train which subsequently pulled into the train station. (A)

The District Court (Charles W. Joiner) granted Respondent's motion for summary judgment, stating that he was basing his decision "primarily and largely" on a Seventh Circuit Court decision, *Ludwig* v. *Massachusetts Mutual Life Insurance Company*, 524 F.2d 376 (CCA 7, 1975), subsequently reversed, *Massachusetts Mutual Life Insurance Company* v. *Ludwig*, 426 U.S. 479 (1976).

The Court of Appeals affirmed the judgment of the District Court. In doing so, it read facts into the case that were never admitted, by stating that the insured "was waiting for his train when he leaned over the edge of the platform presumably to ascertain whether a train was approaching, and fell on the tracks" (2a), and by stating that the term "boarding" include(s) a passenger who has purchased his ticket and is waiting momentarily on the platform to board a subway" (2a).

The District Court did not give any consideration to the term "boarding", since it relied on the Seventh Circuit Court decision in *Ludwig*, which interpreted policy language "while a passenger in or upon a public conveyance", which language did not include the term "boarding" in the policy there involved. The Court of Appeals concluded that the Michigan courts would hold that the insured's death would be comprehended within the term "boarding" as used in the insurance policy. The Court of Appeals further stated that "this conclusion is reinforced by the decisions below of Judges Pratt [who had nothing to do with the instant case] and Joiner, two able and experienced District Judges familiar with the law of the State." (2a)

ARGUMENT

THE COURT OF APPEALS DENIED PETITIONER A REASONABLE JUDICIAL HEARING IN DENYING RELIEF IN ITS APPEAL OF RIGHT.

The Court of Appeals determined that the pivotal word of the insurance contracting was "boarding" (2a). The only decision of the Michigan Supreme Court defining that word is *Formiller* v. *Detroit United Railway*, 164 Mich. 653, 13 N.W. 347 (1911) wherein the Court said at page 660, "Everybody understands that it means getting on the car." The Court of Appeals gave absolutely no consideration to this decision, although it was contained in Petitioner's Brief on appeal. (10a). Rather, it considered *Nickerson* v. *Citizens United Insurance Company*, 393 Mich. 324, 244 N.W. 2d 896 (1975), which considered the definition of the term "occupying", *Quinn* v. *New York Life Insurance Co.*, 224 Mich. 641, 195 N.W. 427 (1923), which involved the contract term "while traveling as a passenger on a street car", and *Ludwig* v. *Massachusetts Mutual Life Insurance Company*, 524 F.2d 376 (1975), a Seventh Circuit decision, regarding Michigan law respecting a contract not containing the word "boarding", written by a Senior United States District Court Judge from Oregon sitting by designation, that was

peremptorily reversed by this Court, *Massachusetts Mutual Life Insurance Company* v. *Ludwig*, 426 U.S. 479 (1976).

By answers to requests for admissions and statements in District Court briefs (6a, 7a), the only agreement of fact made by the parties was that the death of the insured was accidental and that his death occurred when he fell from a subway station platform in Toronto, Ontario, Canada, onto train tracks after apparently paying his fare to get into the subway station, and was struck and killed by a subway train that subsequently pulled into the station.

The Court of Appeals based its decision upon the following claimed facts that were never admitted by stating that the insured "was waiting for his train when he leaned over the edge of the platform, presumably to ascertain whether a train was approaching, and fell on the tracks" (1a) and by stating that the term "boarding" "include(s) a passenger who has purchased his ticket and is waiting momentarily on the platform to board a subway." (2a) Nowhere in the facts available by way of summary judgment was there any admission that the insured was waiting for the train that hit him, or any other train for that matter, nor was there anything by way of proof that established the length of time that the insured was on the platform or that he had any intention of boarding a subway train.

The factual elements of being "momentarily" on the platform, "waiting for his train when he leaned over the edge of the platform, presumably to ascertain whether a train was approaching", were not a valid part of a judicial resolution, but the Court of Appeals gratuitously added them to support its decision that the insured was "boarding" the train, and affirmed a judgment of $200,000.00 against Petitioner as a result.

This case was consolidated on appeal with another case by the same plaintiff against another insurance company, namely *Dorothy Aylesworth* v. *The Travelers Insurance Company*, 77-1433. The District Judge who decided that

case, the Honorable Philip Pratt, gave no reasons for his decision other than to say the insured was a passenger (8a). The instant case was decided in the District Court by the Honorable Charles W. Joiner, who based his decision "primarily and largely" (4a) on the Seventh Circuit decision in *Ludwig* v. *Massachusetts Mutual Life Insurance Company*, supra, subsequently reversed by this Court. The Court of Appeals in deciding the instant case stated that its decision was:

> ". . . reinforced by the decision below of Judges Pratt and Joiner, two able and experienced Michigan District Judges familiar with the law of the State." (2a)

When litigants appeal to a United States Court of Appeals from a final judgment of a United States District Court they do so as a matter of right, 28 U.S.C. 1291, and are entitled to have their controversies resolved by judges giving judicial consideration to the matter.

We submit that any judicial review which, even in part, relies upon the reputation of the judges whose decisions the court is obliged to judge, fails to give fair judicial consideration, for it then becomes a determination of law based upon men and not upon independent judicial reasoning. The reliance of the Court of Appeals, here, upon "two able and experienced Michigan District Judges familiar with the law of the State" is patently without merit, because one of the judges gave no reasons for his decision and the other judge relied "primarily and largely" on the opinion of an Oregon District Court Judge sitting by designation on the Seventh Circuit, which decision was peremptorily reversed by this Court.

We submit that when a appellate court adds facts not a part of the consideration of the decision being reviewed because those facts were beyond any admission or concession made by Petitioner, it is not the giving of judicial consideration or judicial review.

We further submit that when a United States Court of Appeals reviews a diversity case dealing with the interpretation of contract terms under state law, and concludes that a particular term, in this case "boarding", is pivotal, it must consider the only state supreme court decision defining the particular term, particularly if such decision is called to its attention. Failure to consider such a decision and reliance upon state supreme court decisions involving the meaning of other, different terms, is not proper judicial consideration by the Court of Appeals.

This Court, during a time of proliferation of federal administrative tribunals, examined the requirement of fairness for an administrative review hearing within the Department of Agriculture. *Morgan* v. *United States*, 298 U.S. 468 (1936), and 304 U.S. 1 (1938). There, analogy was made to the accepted, traditional understanding of a judicial hearing, and it was held that the substance of judicial fairness must be afforded in administrative, quasi-judicial hearings. In *Morgan* v. *United States*, 298 U.S. 468, 480, this Court, in describing some of the elements of a judicial hearing said:

> "Nothing can be treated as evidence which is not introduced as such . . ., Facts and circumstances which ought to be considered must not be excluded. Facts and circumstances must not be considered which should not influence the conclusion."

In reasoning as to why administrative agencies with quasi-judicial powers must adhere to accepted concepts of judicial consideration, this Court said in *Morgan* v. *United States*, 304 U.S. 1, 22:

> ". . . if these multiplying agencies deemed to be necessary in our complex society are to serve the purposes for which they are created and endowed with vast powers, they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play."

When the Court of Appeals considered claimed facts that it read into the case without any basis therefor, it treated as evidence something that was not evidence or a substitute therefor.

When the Court of Appeals resolved that the term "boarding" was pivotal to the case, but refused to consider the decision of the Michigan Supreme Court as to the meaning of that term, it excluded a circumstance that should have been considered.

When the Court of Appeals relied upon the "able and experienced . . . Judges familiar with the law of the State", it considered a circumstance that should not legally influence its decision.

These enumerated failures of the Court of Appeals are materially in conflict with "the cherished judicial tradition embodying the basic concepts of fair play." *Morgan* v. *United States*, 304 U.S. 1, 22.

The *Morgan* cases determined what litigants can expect from administrative agencies by way of procedural due process as guaranteed by Amendment IV to the Constitution of the United States. When this guarantee is measured by traditional concepts of judicial consideration, it must follow that United States Courts are equally obligated to give consideration to disputes that conform to basic concepts of fair play.

When a tribunal manufactures facts without any basis in the record therefor, this is not fair play.

When a tribunal is bound by state law and determines that a particular word of a contract is pivotal, in this case "boarding", and ignores the only state supreme court decision as to the meaning of the pivotal word, this is not fair play.

When the decisions of Federal District Judges are reviewed by a tribunal with a conscious eye on the

reputation of the judges being reviewed, rank is being substituted for principle, and this is not fair play.

This case, on judicial review, was placed upon the summary calendar, *sua sponte*, by the order of the Court of Appeals pursuant to its Rule 7. This calendar is for cases deemed "of such a character as not to justify extended oral argument."

We can appreciate that docket pressures may call for expedited methods of consideration. Docket pressures, however, must not deny historic, accepted standards of judicial consideration on judicial review. Unless these concepts are to be given only lip service, this Court must act to reverse Court of Appeals decisions that reveal an absence of a deliberate consideration under traditional judicial standards, which is the measure of Fourth Amendment due process of law under the Constitution of the United States.

CONCLUSION

WHEREFORE, Petitioner prays that a writ of certiorari be granted and that this Court peremptorily order that this case be reversed and remanded to the United States Court of Appeals for the Sixth Circuit for consideration by a different panel.

Respectfully submitted,

ARTHUR M. HOFFEINS (P-15030)
Attorney for Petitioner
3553 City National Bank Building
Detroit, Michigan 48226
Telephone: (313) 962-6630

APPENDIX A

No. 77-1400
No. 77-1433

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

DOROTHY AYLESWORTH,
Plaintiff-Appellee,
v.
MUTUAL OF OMAHA, (77-1400)
Defendant-Appellant.
DOROTHY AYLESWORTH,
v.
TRAVELERS INSURANCE COMPANY,
(77-1433)
Defendant-Appellant.

ON APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed May 22, 1979.

Before: ENGEL and MERRITT, Circuit Judges; PHILLIPS, Senior Circuit Judge.

PER CURIAM. The defendant insurance companies appeal the orders of District Judges Pratt and Joiner granting summary judgment to the plaintiff in two diversity suits to collect benefits under a policy of accident insurance issued by each of the insurance companies. The insurance contracts, which were entered into in Michigan, provide for benefits if the insured were accidentally killed or injured "while riding . . . as a passenger in or on, or entering [in one of the contracts the word here is "boarding" instead of "entering"] or alighting from a public conveyance . . . provided by a common carrier for passenger service . . . ."

The deceased, plaintiff's husband, was killed when he fell from a Toronto subway platform onto the tracks and was

struck by an oncoming train. He had purchased a ticket to ride the subway and was waiting for his train when he leaned over the edge of the platform, presumably to ascertain whether a train was approaching, and fell onto the tracks.

Plaintiff demanded double indemnity in the amount of $50,000 on one of the policies and $200,000 for the accident on the other, and the companies refused payment. Plaintiff then brought these two suits. After discovery, plaintiff moved for summary judgments contending that the facts are undisputed and clearly establish the liability of the insurors under the policies.

Michigan courts have given broad definition to the term "passenger" as found in similar insurance policies in similar situations where the injured "passenger" no longer had physical contact with, or was waiting for, the conveyance. *See Nickerson* v. *Citizens' Mutual Insurance Co.*, 393 Mich. 324; 224 N.W.2d 896 (1975); *Quinn* v. *New York Life Insurance Co.*, 224 Mich. 641, 195 N.W. 427 (1923). *See also Ludwig* v. *Massachusetts Mutual Life Ins. Co.*, 524 F.2d 376 (7th Cir. 1975) (interpreting Michigan law), *rev'd on other grounds*, 426 U.S. 479 (1976). Our reading of these cases convinces us that Michigan courts would hold that the words "boarding" or "entering a public conveyance" used in these insurance contracts, include a passenger who has purchased his ticket and is waiting momentarily on the platform to board a subway. This conclusion is reinforced by the decision below of Judges Pratt and Joiner, two able and experienced Michigan District Judges familiar with the law of the state.

Accordingly, we hereby affirm the judgments of the District Courts.

APPENDIX B

ORDER

Upon consideration of the Petition for Rehearing filed herein by the Defendant-Appellant, the Court concludes that all of the questions addressed in the Petition for Rehearing were fully considered upon the original submission and decision of this case.

IT IS THEREFORE ORDERED that the Petition for Rehearing be and it is hereby denied.

Entered by the Order of the Court,

JOHN P. HEHMAN, *Clerk*

APPENDIX C
TRANSCRIPT OF OPINION OF THE TRIAL COURT

THE COURT: I'm going to grant the Plaintiff's motion for summary judgment—

MR. HOFFEINS: You're granting Defendant's motion?

THE COURT: Plaintiff's motion.

MR. HOFFEINS: Thank you.

THE COURT: And I'll state the main reasons, if I may first do so, on the record.

I'm not basing it on Judge Pratt's case. I don't know about his case, but, if it has been as indicated, he arrived at the same judgment that I did, independently. It might be even based upon the same analysis.

When you were here before, I sent you back to bring some more facts in this case because I felt that the case was not right for summary judgment. I didn't know what the situation was like so far as how it related to how the subway was running. But, based upon the facts that this is a subway in which you entered the premises after you pay for the transportation by either putting a coin in the slot, or buying a ticket, or something, going in to the subway, and you are on the premises of the subway as a passenger, and you are a passenger all the time. After you put your money in the slot and until you go back and go through the revolving gate that counts you as you get off, I suppose, and I am basing my case, primarily and largely upon Benno P. Ludwig v. Massachusetts Mutual Life Insurance Company, 524 Fed. 2nd, 376, 1975, and I think that case indicates the basic analysis as to why this result is required, and it relies upon Quinn v. New York Life and Rice v. Michigan Railway.

If I can interpret Michigan law correctly, the policy in this case, I think, is really broader than the policy in that

case, and I think leads to conclusions that the motion should be granted. So, if you prepare an order—

MR. ZACK: Your Honor, I have already prepared an order—

THE COURT: Showing that I have—

MR. ZACK: I'll prepare another one.

THE COURT: And make it say that have granted your motion on the grounds stated in open court. If you—I don't know what that is you have there, but, I don't want you to write an opinion or anything. Just do it the way I just asked you do.

MR. ZACK: Thank you.

MR. HOFFEINS: Thank you.

Appendix D

APPENDIX D

REQUESTS FOR ADMISSION

NOW COMES the above named Plaintiff, DOROTHY AYLESWORTH, by and through her attorneys, LIPPITT, HARRISON, PERLOVE, FRIEDMAN & ZACK, and hereby requests that Defendant, Mutual of Omaha, admit the truthfulness of the following statements:

1. That Robert Aylesworth on or about March 4, 1976, was accidentally killed in the City of Toronto, Ontario, Canada.

2. That at the time of Robert Aylesworth's death, the said Robert Aylesworth was riding as a passenger in, boarding or alighting from any public land, air or water conveyance provided by a common carrier primarily for passenger service.

3. That Robert Aylesworth's death falls within the coverage provided and that the amount of Two Hundred Thousand Dollars ($200,000.00) is due and owing.

LIPPITT, HARRISON, PERLOVE,
FRIEDMAN & ZACK

By: (s) Robert C. Zack (P 22676)
Attorney for Plaintiff
18860 West Ten Mile Road
Suite 200
Southfield, Michigan 48075
Telephone: (313) 424-8000

January 10, 1977

ANSWERS TO REQUESTS FOR ADMISSION

NOW COMES the Defendant herein, by Arthur M. Hoffeins, its attorney, and in answer to the Request for Admission filed by the Plaintiff herein says as follows:

1. Admitted.

2. Denied.

3. Denied.

/s/ Arthur M. Hoffeins
Attorney for Defendant
3553 City National Bank Building
Detroit, Michigan 48226
Telephone: (313) 962-6630

Dated: January 24, 1977

APPENDIX E

ORDER FOR SUMMARY JUDGMENT

At a session of said Court, held in the Federal Building, City of Detroit, County of Wayne, State of Michigan on the 26th day of April, 1977.

PRESENT: The Honorable Philip Pratt,
United States District Judge

This matter having come on to be heard with both parties filing briefs and oral argument being held, and the Court being fully advised in the premises,

It is found that Mr. Robert Aylesworth was a passenger when he met his death.

Further, it is found that Michigan Law applies.

IT IS HEREBY ORDERED that Plaintiff's Motion for Summary Judgment be and the same is hereby granted.

Philip Pratt
United States District Judge

APPROVED AS TO FORM:

John D. Reseigh (P24801)
Attorney for Defendant

Henry R. Hanssen, *Clerk*

By: /s/ Robert C. Allen
Deputy Clerk

APPENDIX F

EXCERPT FROM BRIEF ON APPEAL TO COURT OF APPEALS

"Boarding" as used in the policy involved in the instant suit cannot be considered in the broad sense of "awaiting to" or "preparing to" board. It is familiar law that insurance policies are to be considered as a whole and interpreted within the four corners of the instrument. *Fire and Marine Insurance Co.* v. *Scott*, 265 Mich. 29 (1933), *Sloan* v. *Phoenix of Hartford Insurance Co.*, 46 Mich. App. 461 (1973). Here, the concept of "awaiting to" or "preparing to" is particularly dealt with in the policy when it deals with coverage regarding airport premises. In this regard the policy says:

. . . .

> 2. AIRPORT PREMISES: AIRPORT BUS AND LIMOUSINE SERVICE—while on any airport premises immediately before boarding, or immediately after alighting from an aircraft on which the Insured is covered by this policy; or injuries received while riding as a passenger in an airport bus or limousine provided or arranged for by an airline or the airport authority, but only (a) when going to, or after being at, an airport for the purpose of boarding an aircraft on which the Insured is covered by this policy or (b) when leaving an airport after alighting from such an aircraft.

. . . .

When dealing with the facts and the appropriate coverage of this case, the above language was not included. There is no such coverage for subway or railroad premises. This clearly shows the intent of having the concept of "waiting to" or "preparing to" board to apply only to airport premises.

Appendix F

Formiller v. *Detroit United Railway*, 164 Mich. 653 (1911) appears to be the only Michigan case interpreting the word "boarding." In that case the plaintiff claimed that he was injured while attempting to get on a street car. The court said (p. 660):

> The term "boarding" the car used by the pleader and counsel and court is certainly not misleading. Everybody understands that it means getting on the car.